No. 88-2109

In The

Supreme Court of the United States

October Term, 1989

THE STATES OF KANSAS AND MISSOURI,
AS *PARENS PATRIAE*,

Petitioners,

v.

UTILICORP UNITED, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY BRIEF FOR THE PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

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REPLY BRIEF FOR THE PETITIONERS

I. *ILLINOIS BRICK* SHOULD NOT BAR THE STATES' CLAIMS ON BEHALF OF RESIDENTIAL CONSUMERS WHO INCURRED THE ENTIRE ILLEGAL OVERCHARGE.

Petitioners are not seeking to overturn the *Illinois Brick* direct purchaser rule, or even to limit it in any significant way. The States instead merely suggest what the Court has already tacitly acknowledged – that in the

limited situation where indirect purchasers have demonstrably incurred the entire overcharge on the natural gas they bought, the *Illinois Brick* rule should not bar their claims.[1]

The Court has already recognized that there may be factual settings where the *Illinois Brick* rule should not mechanically preclude suits by indirect purchasers. These hypothetical settings – such as a "pre-existing cost-plus contract"[2] or a "cost-plus" contract for a fixed quantity[3] – seem to have been chosen only to ensure the *result* that the entire overcharge be passed on in identifiable form, so that complex issues of apportionment can be avoided.[4] Here that result already exists – the residential consumers *did* bear the entire overcharge.[5] The consumers should be allowed to recover the damages that they alone sustained.

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[1] Indeed, in these limited circumstances it is *Illinois Brick* that is the exception to the fundamental rule of Section 4 of the Clayton Act that *any* person sustaining antitrust injury may sue to recover therefor.

[2] *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 494 (1968).

[3] *See Illinois Brick Co. v. Illinois*, 431 U.S. 720, 735-36 (1977).

[4] *See California v. ARC America Corp.*, ___ U.S. ___, 109 S. Ct. 1661, 1666 n.6 (1989) ("[I]ndirect purchasers might be allowed to bring suit in cases in which it would be easy to prove the extent to which the overcharge was passed on to them."); *see also Illinois ex rel. Hartigan v. Panhandle Eastern Pipe Line Co.*, 852 F.2d 891, 897 (7th Cir.) (en banc), *cert. denied*, 109 S.Ct. 543 (1988).

[5] Respondent and the amicus Washington Legal Foundation argue at length that all the overcharge may not have been passed on, or may somehow have been passed on imperfectly. Such fact-specific arguments are not proper because both lower

(Continued on following page)

It is ironic in light of the Court's expressed preference in *Illinois Brick* and *Hanover Shoe* for "the real economic world rather than an economist's hypothetical model," 431 U.S. at 732, that respondent and the supporting amici are urging the application of abstract economic theories to deny standing to the residential consumers. There is no need for abstract theory here because in the "real economic world" of this case there actually is a complete and easily provable pass through to residential consumers of the full overcharge paid by the utilities.[6]

Respondent erroneously argues that this case will become unreasonably complex unless the direct purchaser rule is applied. However, the outcome of this

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(Continued from previous page)

courts *assumed* a perfect and easily provable pass through of overcharges. Pet. App. A14; A33-34. Indeed, it was respondent UtiliCorp's motion for summary judgment that required such an assumption. This case thus presents the purely legal issue of whether an indirect purchaser who incurs a complete, readily-provable overcharge may sue under *Illinois Brick*.

[6] The United States suggests that a "closer question" would be presented where the direct purchaser "is subject to a written, legally binding obligation to pass on the entire amount of the overcharge," Br. at 26, and further acknowledges that "such an obligation could arise in many ways, including statute, regulation, contract and filed tariff." *Id.* at 26 n.30. But such a legally binding obligation is precisely what this case presents. Here all the overcharges were passed on to residential customers in accordance with the PGA pricing mechanism. As the *Panhandle Eastern* court noted, "for every cubic foot of gas bought by a residential customer, we *know* that the whole overcharge was passed on to the customers in accordance with the fuel pass-through provision of their contract . . . , and we know why (regulation plus the residential consumers' lack of alternatives)." 852 F.2d at 898.

appeal will have no appreciable effect on the complexity of the underlying suit.[7] All antitrust suits are complicated, and this one is no exception – it already contains numerous parties, and numerous claims not only for overcharges, but also for the utilities' lost profits. It will not make the case more complex simply to recognize that each of these discrete claims should belong to the real party in interest – the lost profits to the utilities, and the overcharges to the consumers who actually bore them. Rather, it will promote antitrust enforcement by ensuring that the injured parties rather than the "middlemen" utilities will be compensated.[8]

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[7] Respondent UtiliCorp sets forth an exhaustive litany of claims and parties at pp. 15-19 of its Brief, implying that this Court's ruling can somehow simplify this case for the jury. Br. at 17. The truth is that *all* these claims, and *all* these parties (including the States), will remain in the case regardless of how this Court rules.

[8] Respondent and the United States both implicitly concede that the antitrust goal of compensating injured parties will not be furthered in this case if the utilities are allowed to prosecute the indirect purchasers' claims. Nor can the utilities make a convincing case that they have greater incentive to sue than the States. Here UtiliCorp did not prosecute this case vigorously – it instead *dismissed* its suit in 1986 and did not seek to intervene again for over one year. *See* J.A. at 1. This voluntary dismissal subjects UtiliCorp (and thus any indirect purchasers it seeks to represent) to a serious threat from a statute of limitations defense that the States, which filed in 1985 and 1986, do not face. The doubtful prospect that a public utility commission will allow utilities to keep double or triple damages also cannot provide utilities with any real incentive to sue; the United States' unsupported suggestion to the contrary, Br. at 25, reflects a woeful misunderstanding of how public utility regulation operates.

Respondent and the United States also suggest that the claims of various industrial and commercial customers may be lost if the direct purchaser rule is not applied. The States have never advanced this argument, nor does the record support it.[9]

The extreme position on the direct purchaser rule is being advance here not by the States, but by respondent, and particularly by the United States. The Solicitor General suggests that if a direct purchaser can allege *any* antitrust injury, no matter how small, that direct purchaser should be allowed to recover all damages, *including overcharges that were completely passed on. See, e.g.,* United States Br. at 6.[10] This argument as a practical

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[9] UtiliCorp in fact argued to the contrary below. *See* Brief of Appellee UtiliCorp United Inc., filed in the Tenth Circuit on September 19, 1988 (J.A. 7), at 20-21. Moreover, as Judge Posner reasoned in *Panhandle Eastern*, the fuel-switching capabilities of industrial and commercial consumers make it unlikely that the entire overcharge will be passed on to them. 852 F.2d at 898. In these circumstances, in order to avoid the complex battle over apportionment that the Court rejected in *Illinois Brick*, the utilities as direct purchasers *should* prosecute these claims.

[10] The United States is able to make this argument only by wrenching the words "has not been damaged" in *Hanover Shoe* out of all context. *See* United States Br. at 7. The United States' argument necessarily ignores language in *Illinois Brick* and *ARC America* indicating that the Court's concern was not with separate claims for overcharges and lost profits, which are well recognized in antitrust law. The Court was instead concerned about the difficulty of apportioning the *overcharge itself* among various levels of direct and indirect purchasers. *See Illinois Brick*, 431 U.S. at 737; *ARC America*, 109 S.Ct. at 1666 n. 6.

matter means that the *Illinois Brick* rule will be absolutely without exception. Even where a textbook "pre-existing cost-plus contract" for a *fixed quantity* exists, the direct purchaser may still be damaged, as the United States itself recognizes. *See* United States Br. at 9 n.4 ("A direct purchaser may be damaged despite the existence of a cost-plus, fixed quantity contract – for example, if there is imperfect compliance with the contract."[11] The United States' position would encourage direct purchasers to assert *de minimis* claims so that they could reap windfall recoveries of overcharges that were fully passed on.

Petitioners are not seeking to revoke the direct purchaser rule of *Hanover Shoe* and *Illinois Brick*.[12] But where

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[11] Further, as Judge Posner noted in *Panhandle Eastern*, "the seller under a fixed-quantity cost-plus contract might forebear to insist on a 100% pass through in order to curry favor with the buyer for the sake of future deals." 852 F.2d at 898. It is not difficult to imagine other *de minimis* claims for damages by direct purchasers, such as one based on the time lag between the date the overcharge was incurred and the date payment for a 100% pass on was received.

[12] The States do find it curious that United States is now attempting to argue that the direct purchaser rule is "long standing" and has been consistently applied since at least 1906. United States Br. at 12. Not only does this argument ignore a host of lower court opinions, as well as this Court's post-*Illinois Brick* focus on "tangible economic injury" in *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 475 n. 11 (1982), it contradicts the government's own position in 1976 in *Illinois Brick*. There, on complicated facts that fully justified this Court's concerns about injecting unwieldy apportionment issues into antitrust litigation, the United States urged that indirect purchaser claims be *allowed*.

indirect purchasers have admittedly incurred all of a challenged overcharge, the rule cannot sensibly be applied.

II. THE STATES' *PARENS PATRIAE* CLAIMS ARE AUTHORIZED BY CONGRESS AND WERE NOT FORECLOSED BY *ILLINOIS BRICK*

The Hart-Scott-Rodino Antitrust Improvements Act (the "Act") expressly authorizes the States' *parens patriae* actions.[13] Although respondent correctly recognizes that the Act was intended "to enforce consumers' *existing* rights of recovery under Section 4," Br. at 29 (emphasis original), respondent overlooks the fact that the Act was passed in 1976 – prior to *Illinois Brick* – when suits by indirect purchasers were still allowed by the federal

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[13] Respondent and the United States' argument that this issue is not properly before the Court lacks merit. The States' complaints specifically reference the *parens patriae* authority of the attorneys general. *See* Petition for Writ of Certiorari at 4 n.3. The extent of that authority was addressed by the Tenth Circuit, which "assume[d] that [it] comes into play when the individual consumers are the direct purchasers." Pet. App. A7 n.1. The issue was fairly included within Question 1 of the States' petition, which begins: "Do residential indirect purchasers of natural gas, represented *parens patriae* by their state attorneys general, have standing to sue . . . . " Because this pure issue of law was raised in the States' complaints, acknowledged by the Tenth Circuit, and fully briefed by the parties and amici, it is ripe for resolution by the Court. *See Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 697-98 (1984); *Nixon v. Fitzgerald*, 457 U.S. 731, 743 n. 23 (1982). Even if this important issue had not been properly raised, however, the Court may still address it. *See United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 371 n. 4 (1967)

courts. *See, e.g., In re Western Liquid Asphalt Cases* (and cases cited therein), 487 F.2d 191, 197 (9th Cir. 1973), *cert. denied sub nom., Standard Oil Co. of California v. Alaska*, 415 U.S. 919 (1974). Congress clearly assumed that the "consumers' *existing* rights" *included* indirect purchaser suits.

The legislative history of the Act demonstrates not only Congress' understanding in 1976 that indirect purchaser suits were allowed, but also its intent that such claims be part of the *parens patriae* authority of state attorneys general.[14] Congress' intent in 1976 is controlling as to Section 4C, despite the subsequent interpretation of Section 4 announced in *Illinois Brick*. *See Cannon v. University of Chicago*, 441 U.S. 677, 694-704 (1979).

Respondent and the United States erroneously infer from footnote 14 of *Illinois Brick* that the Court has already addressed and rejected the arguments raised here. But the Act was cited there only as evidence of congressional intent to allow indirect purchaser suits under Section 4 of the Clayton Act, not Section 4C. *See* United States Br. at 23-24 n.27. The Court rejected that argument without addressing whether the Act *itself* authorizes

[14] The United States has recognized that Congress intended to authorize *parens patriae* suits on behalf of indirect purchasers. *See* United States Br. at 23-24, n. 27 (summarizing the argument it made in *Illinois Brick* that the Act "allows indirect purchasers to recover overcharges passed through by direct purchasers (as shown in the legislative history of [the Act] and the policy considerations underlying that provision)").

attorneys general to bring *parens patriae* suits on behalf of indirect purchasers. That issue is one of first impression.[15]

Respondent also relies on Congress' failure to amend the Act in the years since *Illinois Brick* as evidence of congressional approval of the decision. However, as the Court noted in *Illinois Brick*, the interpretation of a statute cannot be altered by the action or inaction of subsequent legislators. 431 U.S. at 733 n.14. Further, Congress' failure to overrule *Illinois Brick* may be due to political reasons wholly unrelated to the case. Respondent's arguments to the contrary are pure speculation. *See Johnson v. Transportation Agency*, 480 U.S. 616, 671-72 (1987) (Scalia, J., dissenting).

Congress intended the Act to allow state attorneys general to bring antitrust suits on behalf of indirect purchasers. The legislative history could not be clearer. The Court should decide this case of first impression in favor of the States and allow the *parens patriae* claims to proceed.

[15] The United States argues that the Court in *Illinois Brick* *implicitly* rejected the argument that the Act authorizes *parens patriae* suits on behalf of indirect purchasers. But as the Solicitor General's brief makes plain, the court in *Illinois Brick* was asked to reason by analogy that because (1) the 1976 Act authorizes indirect purchaser suits and (2) Section 4 of the Clayton Act, enacted in 1914, is similarly worded, then Section 4 also must authorize indirect purchaser suits. The Court rejected the conclusion that a 1976 Act could define a 1914 statute, without ever addressing whether the 1976 Act authorizes indirect purchaser suits.

Respectfully submitted,

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